No. 14-520

# In The
# Supreme Court of the United States

VALERIE J. HAWKINS and
JANICE A. PATTERSON,

*Petitioners,*

v.

COMMUNITY BANK OF RAYMORE,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

1. Do primarily, absolutely, and unconditionally liable spousal guarantors within the ECOA zone of interests protected have statutory standing as "applicants" to sue if ECOA violations proximately caused them damage?

2. If Congress did not precisely answer whether "applicant with respect to any aspect of a credit transaction" includes persons primarily, absolutely, and unconditionally liable for the applied-for loan as guarantors, did the Federal Reserve Board have authority under the ECOA to include by regulation spousal guarantors as "applicants" to further the purposes of eliminating discrimination against married women?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... xiv

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTES AND REGULATIONS INVOLVED .... 1

STATEMENT OF THE CASE ..... 1

SUMMARY OF THE ARGUMENT ..... 9

ARGUMENT ..... 16

I. Parties possess statutory standing where their claims fall within a statute's "zone of interests" protected, and the damages claimed are proximately caused by the statutory violations. The ECOA's zone of interests protects the Wives against marital status discrimination in requiring the Wives co-sign and/or guaranty their husbands' business debts, and CBR's ECOA violations proximately caused the Wives' damages. The Wives possess ECOA statutory standing to sue ..... 16

A. The ECOA prohibits requiring spouses to co-sign or guaranty debts. The Wives' Complaint claims CBR required the Wives co-sign and/or guaranty their husbands' business debt. The Wives' claims fall squarely within the ECOA protections ..... 16

TABLE OF CONTENTS – Continued

Page

B. Statutory standing requires falling within the "zone of interests" protected by the statute. The ECOA's broad purposes include eliminating marital status discrimination in credit transactions. The Wives' marital status discrimination claims fall within the ECOA's protected zone of interests ..... 19

1. Expressed legislative purposes clarify the statute's zone of protected interests. The ECOA's expressed purpose requires making credit available without marital status discrimination, including requiring spouses to co-sign and/or guaranty loans ..... 20

2. Traditional statutory construction rules show that ECOA "applicants" include "debtors" contractually liable to pay the applied-for credit. CBR claims the Wives are "debtors" with contractual obligations to pay the applied-for debts. The Wives are "debtor-applicants" possessing ECOA standing ..... 24

TABLE OF CONTENTS – Continued

Page

a. A governing text's words are of paramount concern, and what they convey in their context is what they mean. The ECOA's text shows that primarily, absolutely, and unconditionally liable guarantors contractually obligated to repay the applied-for debt are "applicants" who apply for "credit." The Wives are therefore "debtor-applicants" possessing ECOA standing ..... 25

b. Statutory text must be construed as a whole considering the statute's purpose and context. Construing the ECOA's text as a whole shows persons primarily, absolutely, and unconditionally liable to repay the applied-for debts are "applicants." ..... 28

TABLE OF CONTENTS – Continued

Page

i. "Applicant" must be viewed in context which shows it includes those persons contractually liable to pay including small business owners who co-sign debts. Small business corporation "applicants" have no race, gender, or marital status providing no discriminatory basis upon which they can be denied credit. "Applicant" means persons in addition to the named borrowing entity agreeing to repay the applied-for debt..... 29

ii. ECOA data collection requirements show that "applicants" include persons identified with or connected to the credit transaction. Persons owning small businesses and persons agreeing to repay the applied-for debts are identified with and connected to the credit transaction..... 31

TABLE OF CONTENTS – Continued

Page

c. Statutory interpretations that validate outweigh interpretations that invalidate because legislatures don't enact meaningless laws ..... 33

d. The Wives "applied" under the ECOA to CBR for extensions, renewals, and continuations of credit as co-signors and/or guarantors primarily, absolutely, and unconditionally liable to repay the applied-for Loans. The Wives were "applicants" for renewal falling within the ECOA's "zone of interests." ..... 34

C. The Eighth Circuit's *Hawkins* decision ignores the plain, ordinary meaning of the ECOA to reach an untenable conclusion ..... 35

1. The Eighth Circuit reached the untenable conclusion that illegal contracts violating the ECOA can't be challenged by the Wives because they aren't "applicants." ..... 36

TABLE OF CONTENTS – Continued

Page

2. The Eighth Circuit's interpretation of "applicant" impermissibly narrows the ECOA's protection to only the borrowing entity that approaches the lender, and leaves individual minority business owners unprotected against discrimination because they don't meet the Eighth Circuit's technical definition of "applicant." The Sixth Circuit's interpretation correctly concludes additional persons/entities offering promises supporting an application can be "applicants." ..... 38

3. The ECOA and Regulation B protect individuals such as Valerie Hawkins and Janice Patterson from financial ruin resulting from their spouses' failed business ventures. The Eighth Circuit's interpretation of "applicant" removes spousal guarantors from the ECOA's protection, permits destruction of disinterested spouses' creditworthiness, and promotes credit discrimination against married women..... 42

TABLE OF CONTENTS – Continued

Page

4. Congress does not enact meaningless legislation prohibiting discrimination against persons which can never be enforced. An ECOA "applicant" includes corporate entities which have no race, gender, or marital status, making it impossible to discriminate against these corporate entities without considering those persons identified with and connected to the corporation. The Eighth Circuit's flawed ECOA interpretation concludes that lenders may lawfully deny credit based on the race, gender, marital status, age or religion of individuals owning small corporations without violating the ECOA, opening the floodgates to lender discrimination against closely-held business owners without consequence ..... 45

TABLE OF CONTENTS – Continued

Page

D. Where the "harm alleged has a sufficiently close connection to the conduct the statute prohibits," a plaintiff satisfies the proximate-cause requirement. The Wives' claimed credit reputation injury is sufficiently closely connected to CBR's marital status discrimination requiring the Wives to co-sign for their husbands' business debt. The Wives satisfy the proximate-cause requirement ..... 47

E. Contracts prohibited by law are void and unenforceable, and the ECOA provides equitable and declaratory relief necessary to enforce the ECOA's prohibitions. The Wives alleged that CBR required them to incur personal liability in violation of federal law. The Wives can seek ECOA equitable and declaratory relief for CBR's federal law violations ..... 49

II. Parties to an illegal contract possess standing to invalidate the contract as illegal and unenforceable regardless of statutory standing. No one disputes that the Wives' Complaint claims CBR required illegal contracts violating 12 C.F.R. § 202.7(d) and the ECOA. The Wives possess standing to invalidate illegal contracts regardless of any standing under 15 U.S.C. § 1691e ..... 51

TABLE OF CONTENTS – Continued

Page

A. Declaratory judgment actions allow parties to determine rights prior to suit for coercive remedies. Suits to declare contracts illegal are suits to declare the parties' contract rights prior to seeking coercive remedies for breach. Contract parties have standing to bring declaratory actions to establish the contract's illegality..... 51

B. The ECOA, under 12 C.F.R. § 202.7(d), prohibits requiring spousal guaranties. CBR hasn't challenged § 202.7(d)'s validity, and the Wives' Complaint claims CBR required the Wives' guaranties under the proscribed circumstances. The Wives' Complaint claims CBR violated the ECOA, and the Wives' guaranties are illegal..... 54

TABLE OF CONTENTS – Continued

Page

III. When Congress delegates an agency authority to fill any explicit or implicit statutory "ambiguity" or "gap," courts grant deference to the agency's reasonable interpretation. Congress expressly delegated the FRB broad authority to prescribe regulations effectuating the ECOA's purposes. If Congress's definition of "applicant with respect to any aspect of a credit transaction" is ambiguous concerning primarily, absolutely, and unconditionally liable guarantors, the Court should defer to the FRB's reasonable interpretation ..... 56

A. Congress intended that ECOA "applicants" include "debtors" contractually liable to pay the applied-for debt. The FRB's 1985 Regulation B clarifying amendment underscores Congress's intent that "debtor-applicants" possess ECOA standing. This Court should defer to the FRB's reasonable clarifying amendment..... 56

TABLE OF CONTENTS – Continued

Page

B. Congress intended that an ECOA "applicant with respect to any aspect of a credit transaction" includes primary, absolute, and unconditional guarantors. But, if Congress didn't answer this precise question, then Congress expressly empowered the FRB to address any gap or ambiguity consistent with the ECOA's purpose. The FRB properly exercised its authority by including guarantors within the ECOA's definition of "applicant." ..... 57

C. When Congress charges an agency to implement and enforce a statute, then deference is granted to the agency's statutory interpretation. Congress expressly delegated to the FRB broad authority to prescribe regulations to effectuate the ECOA's purposes. The Eighth Circuit failed to follow binding authorities by substituting its own construction of "applicant" for the decades-long reasonable interpretation made by the FRB ..... 60

TABLE OF CONTENTS – Continued

Page

D. An agency's interpretation that fulfills the statute's purpose is "within the bounds" of the agency's authority and reasonable. The FRB's ECOA interpretation and 1985 Regulation B clarifications that spousal guarantors are applicants fulfill the ECOA's purpose to eradicate marital discrimination in credit transactions. FRB's clarifying amendment is reasonable and entitled to deference ..... 62

CONCLUSION ..... 68

## TABLE OF AUTHORITIES

Page

### CASES

*Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008) ..... 28

*Allen v. Wright*, 468 U.S. 737 (1984) ..... 19

*Anderson v. United Fin. Co.*, 666 F.2d 1274 (9th Cir. 1982) ..... 42, 48

*Arlington v. F.C.C.*, 133 S. Ct. 1863 (2013) ..... 63, 68

*Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 595 F. Supp. 800 (E.D. Pa. 1984) ..... 64

*Bank of the West v. Kline*, 782 N.W.2d 453 (Iowa 2010) ..... *passim*

*Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002) ..... 25

*Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011) ..... 18, 57, 61

*Bennett v. Spear*, 520 U.S. 154 (1997) ..... 20

*Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371 (Mo. 2001) ..... *passim*

*BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006) ..... 25

*Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011) ..... 28

*Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979) ..... 24

*Cherry Manor, Inc. v. Am. Health Care, Inc.*, 797 S.W.2d 817 (Mo. Ct. App. 1990) ..... 26

TABLE OF AUTHORITIES – Continued

Page

*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ..... *passim*

*Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08CV654, 2010 WL 3931496 (N.D. Okla. Oct. 5, 2010) ..... 43

*Citizens Ins. Co. of Am. v. Leiendecker*, 962 S.W.2d 446 (Mo. Ct. App. 1998) ..... 53

*Clune Equip. Leasing Corp. v. Spangler*, 615 S.W.2d 106 (Mo. Ct. App. 1981) ..... 26

*Corley v. United States*, 556 U.S. 303 (2009) ..... 33

*Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989) ..... 28

*Delta Diversified, Inc. v. Citizens & Southern Nat'l Bank*, 320 S.E.2d 767 (Ga. Ct. App. 1984) ..... 64

*Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006) ..... 28

*Empire Bank v. Dumond*, No. 13-CV-0388, 2013 WL 6238605 (N.D. Okla. Dec. 3, 2013) ..... 22, 43, 49

*E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) ..... 58

*Eure v. Jefferson Nat'l Bank*, 448 S.E.2d 417 (Va. 1994) ..... 9, 37, 49

*Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272 (Mo. Ct. App. 2012) ..... 50

*Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280 (2010) ..... 24

TABLE OF AUTHORITIES – Continued

Page

*Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) .....*passim*

*H.B. Halicki Prods. v. United Artists Commc'ns, Inc.*, 812 F.2d 1213 (9th Cir. 1987) .....20

*Hibbs v. Winn*, 542 U.S. 88 (2004) .....33

*In re Kirkland*, 91 B.R. 551 (Bankr. 9th Cir. 1988) .....26

*Integra Bank v. Freeman*, 839 F. Supp. 326 (E.D. Pa. 1993) .....22

*James v. United States*, 550 U.S. 192 (2007).....28

*Jamieson-Chippewa Inv. Co. v. McClintock*, 996 S.W.2d 84 (Mo. Ct. App. 1999).....34

*Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).....*passim*

*Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011).....23, 24, 28

*King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973) .....10, 37, 49

*Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).....*passim*

*Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270 (1941).....52

*MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).....52

*Mercantile Bank, N.A. v. Loy*, 77 S.W.3d 93 (Mo. Ct. App. 2002) .....34, 35

TABLE OF AUTHORITIES – Continued

Page

*Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) .....61

*Morse v. Mut. Fed. Sav. & Loan Assoc. of Whitman*, 536 F. Supp. 1271 (D. Mass. 1982).....64

*N.L.R.B. v. Bell Aerospace, Co.*, 416 U.S. 267 (1974).....14, 18, 62

*Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237 (1952).....54

*RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380 (6th Cir. 2014).....*passim*

*Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).....24, 25

*Sayers v. General Motors Acceptance Corp.*, 522 F. Supp. 835 (W.D. Mo. 1981) .....48

*Sebelius v. Cloer*, 133 S. Ct. 1886 (2013).....25

*Shaumyan v. Sidetex Co.*, 900 F.2d 16 (1st Cir. 1990).....22

*Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3d Cir. 1995).....*passim*

*Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584 (2013).....20

*Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998).....19

*Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004).....8

*Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944) .....24

TABLE OF AUTHORITIES – Continued

Page

*Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60 (1975) ..... 68

*United Food & Commercial Workers Local Union Nos. 137, 324, 770, 899, 905, 1167, 1222, 1428, & 1442 v. Food Emp'rs Council, Inc.*, 827 F.2d 519 (9th Cir. 1987) ..... 51, 52, 53, 54

*United States v. Beneficial Corp.*, 492 F. Supp. 682 (D.N.J. 1980), *aff'd*, 673 F.3d 1302 (3d Cir. 1981) ..... 23

*United States v. Bernstein*, 423 U.S. 303 (1976) ..... 24

*United States v. Kelley*, 890 F.2d 220 (10th Cir. 1989) ..... 26

*United States v. Mead Corp.*, 533 U.S. 218 (2001) ..... 18, 57, 58, 61

*United States v. Meadors*, 753 F.2d 590 (7th Cir. 1985) ..... 9, 37

*United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) ..... 25

*Utility Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014) ..... 63, 67

*Young v. Cmty. Nutrition Inst.*, 476 U.S. 974 (1986) ..... *passim*

STATUTES

15 U.S.C. § 1127 ..... 20

15 U.S.C. § 1691 ..... 1, 21, 39

15 U.S.C. § 1691a ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 1691b ..... *passim*
15 U.S.C. § 1691c-2 ..... 12, 13, 31, 32, 46
15 U.S.C. § 1691e ..... 1, 7, 51, 53
28 U.S.C. § 1254 ..... 1
28 U.S.C. § 1331 ..... 6, 54
28 U.S.C. § 1367 ..... 7, 54
28 U.S.C. § 2201 ..... 51, 52, 53
Mo. Rev. Stat. § 400.9-105 ..... 26
Mo. Rev. Stat. § 527.010 ..... 53
Mo. Rev. Stat. § 527.020 ..... 53
Mo. Rev. Stat. § 527.030 ..... 53

REGULATIONS

12 C.F.R. § 202.1 ..... 64
12 C.F.R. § 202.16 ..... 7
12 C.F.R. § 202.17 ..... 7
12 C.F.R. § 202.2 ..... 1, 59, 67
12 C.F.R. § 202.2 (1977) ..... 66
12 C.F.R. § 202.7 ..... *passim*
12 C.F.R. § 202.7 (1975) ..... 7, 13, 17, 54, 55

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (10th ed. 2014) .....26

Delores S. Smith, *Revision of the Board's Equal Credit Regulation: An Overview*, 1985 FEDERAL RESERVE BULLETIN 913 (Dec. 1985) .....66

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1085(1), 124 Stat. 1376, 2083 (2010) .....58

Equal Credit Opportunity, 72 Fed. Reg. 63,451 (Nov. 9, 2007) .....7

Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1500 (1974) .....*passim*

Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 10,890 (Mar. 18, 1985) .....65

Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018 (Nov. 20, 1985) .....59, 65, 67

Official Staff Interpretations, 12 C.F.R., Part 202, Supp. I (Aug. 15, 2011) .....15, 58

S. Rep. No. 94-589 (1976) .....21, 22, 23

Wright, Miller, & Kane, *Purpose of Declaratory Judgments*, 10B Fed. Prac. & Proc. Civ. § 2751 (3d ed.) .....52

## OPINIONS BELOW

The Eighth Circuit Court of Appeals' opinion in *Hawkins, et al. v. Community Bank of Raymore* (Pet. App. 1) is reported at 761 F.3d 937. The District Court's opinion (Pet. App. 17) is unreported.

## JURISDICTION

The court of appeals entered judgment on August 5, 2014. *See* J.A. 13. The Petitioners filed the Petition for Writ of Certiorari on November 4, 2014. This Court granted the Petition on March 2, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).[1]

## STATUTES AND REGULATIONS INVOLVED

15 U.S.C. § 1691; 15 U.S.C. § 1691a; 15 U.S.C. § 1691b; 15 U.S.C. § 1691e; 12 C.F.R. § 202.2; and 12 C.F.R. § 202.7 are reproduced in Petitioners' Petition for Writ of Certiorari at Pet. App. 38-62.

## STATEMENT OF THE CASE

Community Bank of Raymore ("CBR") made four loans totaling $2,077,900 to develop a residential

[1] All references to the United States Code are to the 2014 Code unless expressly otherwise noted.

subdivision owned by PHC Development, LLC ("PHC") in Peculiar, Missouri (the "Loan(s)"). Doc. 35 at 6-7 (*Defendant's Suggestions in Support of Its Motion for Summary Judgment* at 2-3). Gary Hawkins (individually) and Chris Patterson (as trustee for the Chris L. Patterson and Janice A. Patterson Living Trust Dated June 14, 2000) are PHC's member-owners. Doc. 70 at 7 (*Suggestions in Support of Defendant's Motion for Summary Judgment on Its Counterclaims for Breach of Guaranties & Plaintiffs' Affirmative Defenses* at 1).

Petitioners Valerie Hawkins and Janice Patterson (collectively, the "Wives" or "Petitioners") were not members, officers, or otherwise interested in PHC. Doc. 1 at 11 (*Complaint* at 11). The Wives didn't volunteer to guarantee the Loans' repayment. Doc. 1 at 11. CBR nevertheless required the Wives' primary, absolute, and unconditional responsibility to repay the applied-for Loans by signing CBR's loan papers (the "Guaranties"). Doc. 40 at 20 (*Community Bank of Raymore's First Amended Counterclaim* at 20).

CBR first loaned $249,900 on March 31, 2005, enabling PHC to buy the subdivision land. Doc. 35 at 6-7. Second, CBR loaned $1,170,000 on June 15, 2006, to build sewers, roads, etc. Doc. 35 at 7. On March 6, 2008 and October 20, 2006, CBR made the third and fourth Loans for $550,000 and $108,000, respectively. Doc. 35 at 7.

When CBR approved the applied-for Loans, CBR's internal loan memos analyzed PHC's financial

strength, identified the Wives as guarantors under CBR industry-standard loan papers, and reviewed loan collateral. *See, e.g.*, Doc. 79-7 at 1-3 (Exhibit 72 to *Plaintiffs' Suggestions in Opposition to Defendant's Motion for Summary Judgment on Its Counterclaims for Breach of Guaranties & Plaintiffs' Affirmative Defenses* at 1-3). CBR's internal loan memos noted the Wives needed to sign under industry-standard guaranty documents having primary, absolute, and unconditional responsibility to repay the applied-for Loans. Doc. 79-7 at 1. The Wives comprised part of the loan review and approval process. Doc. 79-7 at 1-3.

CBR used industry-standard, form loan papers purchased from leading loan document software companies including Bankers Systems, Inc. and Harland Financial Solutions, Inc. (LaserPro Lending). Doc. 40-1 at 1 – Doc. 40-2 at 99 (Exhibits A-ZZ to *Community Bank of Raymore's First Amended Counterclaim*). Under those industry-standard loan papers, CBR claims the Wives must repay the applied-for Loans even if CBR elects not to pursue PHC, the collateral, Gary Hawkins, Chris Patterson, or anyone else obligated to pay. Doc. 70 at 43.

The Wives' industry-standard, "all encompassing" Guaranties make the Wives "primarily" liable:

> Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness,

> this Guaranty or any other guaranty of the Indebtedness.

The Wives' industry-standard Guaranties further state:

> Guarantor's Share of the Indebtedness will only be reduced by sums actually paid by Guarantor under this Guaranty, but will not be reduced by sums from any other source including, but not limited to, sums realized from any collateral securing the Indebtedness or this Guaranty, or payments by anyone other than Guarantor.

*See, e.g.*, Doc. 79-7 at 83. CBR confirmed its belief that the Wives' primary liability was "absolute and unconditional" to repay the Loans by later suing the Wives to do just that – collect the Loans from the Wives before collecting from Gary Hawkins, Chris Patterson, PHC, or the collateral. Doc. 70 at 18, 43.

After CBR closed the first Loan on March 31, 2005 to buy the subdivision land, CBR extended, renewed, and continued that Loan twice – May 1, 2010 and November 1, 2010. Doc. 35 at 7. After CBR made the second Loan to build sewers and streets on June 15, 2006, CBR extended, renewed, and continued the second Loan four separate times – June 15, 2007; June 15, 2008; October 15, 2008; and June 15, 2009. Doc. 35 at 7-8.

Similarly, after CBR made the third Loan on March 6, 2008, CBR extended, renewed, and continued the third Loan twice – March 15, 2010 and November

1, 2010. Doc. 35 at 8. After CBR made the fourth Loan on October 20, 2006, CBR extended, renewed, and continued the fourth Loan four separate times – June 15, 2007; June 15, 2008; October 15, 2008; and June 15, 2009. Doc. 35 at 8.

When each Loan matured, CBR claims the Wives' industry-standard, "all encompassing" Guaranties made them primarily, absolutely, and unconditionally liable to repay the Loans. Doc. 70 at 18, 43. Simply put, when each Loan matured, CBR claims the Wives independently agreed to repay the Loans unless CBR extended, renewed, or continued the Loans. Doc. 70 at 27-28, 43. For instance, on May 1, 2010, when the first Loan matured, CBR claims the Wives were required to repay the $249,900 even if CBR elected not to pursue PHC, the collateral, Gary Hawkins, Chris Patterson, or anyone else obligated to pay. *Id.*

That is, CBR claims the Wives independently owed the $249,900. *Id.* Accordingly, the Wives needed CBR to defer payment of the first Loan debt by extending, renewing, or continuing the credit or face suit to collect the full amount. *Id.* The other three Loans were the same. When each Loan matured, the Wives needed CBR to extend, renew, or continue the credit or face suits to collect the full amounts.

Just like the initial memos approving all four of the applied-for Loans, when CBR extended, renewed, or continued each Loan at each maturity, CBR analyzed the same information. *See, e.g.*, Doc. 79-6 at 22-24, 78-81; Doc. 79-13 at 52-54. That is, CBR analyzed

PHC's financial strength; identified the Wives as guarantors under CBR's industry-standard loan papers making the Wives primarily, absolutely, and unconditionally liable; and identified collateral for the Loans. *Id.* CBR's internal loan memos show the Wives were part of the loan review and approval process for each extension, renewal, or continuation of the credit. *Id.*

PHC's, Gary Hawkins's, and Chris Patterson's relationship with CBR soured in 2010 over allegations of CBR's fraud. Doc. 79 at 78-86. Specifically, Gary Hawkins and Chris Patterson claimed CBR fraudulently procured a security interest in collateral never agreed to by PHC, Gary Hawkins, Chris Patterson, or the Wives. *Id.*

A later dispute rooted in the same claims of CBR's earlier fraud surfaced in 2012 over how to restructure the Loans. Doc. 79 at 78-87. PHC, Gary Hawkins, Chris Patterson, and CBR reached an impasse. In short, it became bitter, and CBR demanded payment or warned it intended to sue including claims against the Wives. Doc. 35-5 at 36-37, 41-42.

The Wives preemptively filed their Federal Court suit, asserting jurisdiction under 28 U.S.C. § 1331. Doc. 1 at 1-13. The Wives claimed marital status discrimination by CBR requiring the Wives to sign form loan papers violating the ECOA. Doc. 1 at 12.

The Wives' claims were rooted in Regulation B which originated in 1975 by the Federal Reserve Board's ("FRB") prohibition against creditors requiring

spousal signatures. *See* 12 C.F.R. § 202.7 (1975); Doc. 1 at 12. Under Regulation B, creditors may request additional signatures for the debt, but may not require that it be the spouse. 12 C.F.R. § 202.7(d)(5). CBR hasn't challenged this Regulation B prohibition.

The Wives claim CBR's ECOA violations caused them actual damages, including monetary losses, attorneys' fees, injury to credit reputation, mental anguish, humiliation, and embarrassment. Doc. 1 at 12-13. The Wives further requested "an order declaring as void the purported Guaranties and declaring that Valerie J. Hawkins and Janice A. Patterson are not liable on the purported Guaranties pursuant to 15 U.S.C. § 1691e(c) and 12 C.F.R. § 202.17(b)." Doc. 1 at 12-13.[2]

CBR invoked 28 U.S.C. § 1367(a) supplemental jurisdiction, claiming in its Amended Counterclaim it can collect the Loans from the Wives. Doc. 40 at 19-23. CBR moved for summary judgment claiming the Wives lacked standing under the ECOA, and requesting that the Wives be held primarily, absolutely, and unconditionally liable for the Loans before CBR obtained a judgment against PHC, Gary Hawkins, or Chris Patterson. Doc. 35 at 13-20; Doc. 70 at 24-27.

The District Court ruled that the Wives weren't ECOA "applicants," and therefore lacked standing to

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[2] 12 C.F.R. § 202.17(b) was re-designated as 12 C.F.R. § 202.16(b). *See* Equal Credit Opportunity, 72 Fed. Reg. 63,451 (Nov. 9, 2007).

assert ECOA claims or affirmative defenses (the "ECOA Order"). Pet. App. 17-24. The District Court then discontinued exercising supplemental jurisdiction and dismissed CBR's Counterclaims without prejudice on August 30, 2013. Pet. App. 25-34. The District Court entered Judgment on September 6, 2013, and an Amended Judgment on September 10, 2013. Pet. App. 35-36. The Wives timely filed their notice of appeal on September 13, 2013. Doc. 106 at 1-2 (*Notice of Appeal* at 1-2). The parties argued the case April 17, 2014. The Eighth Circuit issued its Opinion on August 5, 2014, affirming the District Court's no-standing ruling. Pet. App. 1-16.

Here, the Wives challenge the Eighth Circuit's ECOA no-standing conclusions. *See* Pet. App. 1-16. The Eighth Circuit decided the ECOA's definition of "applicant" unambiguously excludes the Wives as primarily, absolutely, and unconditionally liable spousal guarantors because they were not deemed an integral part of "any aspect of a credit transaction." *See* Pet. App. 6-10. The Eighth Circuit refused to defer to the FRB interpretation of "applicant" under 15 U.S.C. § 1691a(b). Pet. App. 9.

The Eighth Circuit's decision directly conflicts with the Sixth Circuit's decision that "applicant" includes spousal guarantors. *See RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 384-86 (6th Cir. 2014). The Eighth Circuit's ruling also conflicts with state courts of last resort in Alaska (*Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004)); Iowa (*Bank of the West v. Kline*, 782 N.W.2d

453 (Iowa 2010)); Missouri (*Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371 (Mo. 2001)); and Virginia (*Eure v. Jefferson Nat'l Bank*, 448 S.E.2d 417 (Va. 1994)).

## SUMMARY OF THE ARGUMENT

In a dizzying effort to substantiate dismissing the Wives' claims, the Eighth Circuit stated that "[i]f [the Wives] do not qualify as applicants, then [CBR] did not violate the ECOA by requiring them to execute the guaranties." Pet. App. 5. Stated differently, even though the ECOA and Regulation B prohibit requiring spouses to co-sign or guaranty debts, lenders aren't liable because the persons required to sign can't sue.

In short, the ECOA and Regulation B spousal signature prohibition, which has remained unchallenged for over forty (40) years, is now a nullity. *Hawkins* grants lenders an untethered license to require spousal signatures with impunity.

The Eighth Circuit's oversimplified conclusions exact a disservice on the black letter principle that illegal contracts are unenforceable. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 78 (1982); *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 33 (3d Cir. 1995); *United States v. Meadors*, 753 F.2d 590, 593 (7th Cir. 1985); *Kline*, 782 N.W.2d at 461; *Eure*, 448 S.E.2d at 419; *Boone*, 47 S.W.3d at 375;

*King v. Moorehead*, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973).

For instance, under the Eighth Circuit's conclusions, persons being sued in federal court to enforce illegal guaranties violating the ECOA can't defend the illegal guaranties' enforcement. That is, according to the Eighth Circuit, "a guarantor is not protected from marital-status discrimination by the ECOA" even though the contract violates the signature prohibitions. Pet. App. 9.

Simply put, the federal courts will be required to lend themselves to the enforcement of illegal contracts directly contradicting this Court's prior rulings. *See Kaiser*, 455 U.S. at 78.

Contrary to these erroneous conclusions, standing to sue must be used to enforce limits on discrimination; blindly accepting discrimination must not be used to eliminate standing to sue.

Moreover, the Eighth Circuit asserts that the ECOA only protects individuals who have "participated in the loan-application process." Pet. App. 10. But the Eighth Circuit didn't elaborate on the extent to which individuals must "participate" to qualify as applicants, except to state that guarantors don't "participate" by virtue of signing their guaranties. Pet. App. 4-11. The Eighth Circuit determined that the Wives, based purely on their status as guarantors, couldn't be considered applicants. *Id.* The Eighth Circuit's lack of analysis is telling because it limits

protection only to the borrowing entity who applied for the loan.

For example, under the Eighth Circuit's impermissibly narrow reading of "applicant," if the Wives formally had co-signed promissory notes with PHC, the Wives are "applicants." However, simply because the Wives signed as primarily, absolutely, and unconditionally liable guarantors (in substance co-signing the Loans under Missouri law), the Wives aren't entitled to ECOA protection. The Eighth Circuit's narrow reading is circuitous and elevates form over substance.

What does the Eighth Circuit's vague notion of "participating in the loan application process" really mean? Is only the borrowing entity participating in "any aspect of a credit transaction"? Is a lender-required spousal guarantor not participating? Did PHC's owners, Chris Patterson and Gary Hawkins, also guarantors, participate in the "loan application process"? If so, how was their participation different than the Wives'? These questions indict the Eighth Circuit's ruling.

Under the Eighth Circuit's narrow reading, if two minority women form a corporation to operate their business, and they are denied credit, they have no standing because the corporation is technically the "borrower" and the only "applicant." The corporation has no race, gender, marital status, etc. against which to discriminate.

We are thus given a choice between standing for minority and women corporation owners, and a brazen license to discriminate. If the Court chooses no-standing, then we most certainly will have brazen discrimination.

CBR also trumpets an impermissibly "grudging, narrow" ECOA interpretation adopted by *Hawkins* that can't withstand even minimal reflection under the ECOA's data collection requirements. 15 U.S.C. § 1691c-2. The ECOA requires lenders to gather "small business loan" information relating to "women-owned" and "minority-owned" businesses. § 1691c-2(a)-(b).

The ECOA expressly prohibits bank "underwriters or other officer[s] or employee[s]" who determine approvals "concerning an application for credit" any access to information on the women or minority owners. § 1691c-2(d)(1). In fact, if those bank decision makers learn of such information, the bank must provide notice to the "applicant" that such decision makers learned of the women-owned, minority-owned information and that the bank "may not discriminate on the basis of such information." § 1691c-2(d)(2).

As if this doesn't seem to slam the door on CBR's "grudging, narrow" ECOA interpretation, further provisions sound the door closing even more loudly. The required information gathering includes "the principal place of business of the women-owned [or] minority-owned" business and "the race, sex, and

ethnicity of the principal owners of the business." § 1691c-2(e)(2)(E), (G).

Surely looking behind the veil of a small business corporation at who the owners are to establish ECOA discrimination was fully envisioned by Congress. Otherwise, a "grudging, narrow" ECOA reading would provide lenders unbridled license to discriminate against small corporations claiming they have no race, gender, marital status, etc.

Also, since its 1975 enactment, Regulation B has prohibited creditors from requiring spousal signatures to co-sign or guaranty debts. *See* 12 C.F.R. § 202.7 (1975). The current Regulation B continues this prohibition. 12 C.F.R. § 202.7(d)(1). While a creditor may request additional signatories for the debt, it can't require a spouse. 12 C.F.R. § 202.7(d)(5).

Congress expressly delegated authority to the FRB to "prescribe regulations" that "in the judgment of the [FRB] are necessary or proper to effectuate the purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a). It is well-settled that the agency's interpretation of the statute it is charged to administer is entitled to great deference.

In Regulation B's forty (40) years, Congress hasn't amended this spousal guaranty prohibition. In fact, Congress amended the ECOA in 2010, reaffirming that FRB regulations carry the force of law. 15 U.S.C. § 1691a(g) ("Any reference to any requirement

imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.").

This Court has concluded "congressional failure to revise or repeal the agency's [statutory] interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 983 (1986) (quoting *N.L.R.B. v. Bell Aerospace, Co.*, 416 U.S. 267, 275 (1974)).

Here, CBR hasn't challenged the FRB's § 202.7(d) prohibition against requiring spouses to co-sign or guaranty debts. The Eighth Circuit did not consider the FRB's authority under § 202.7(d) either. Pet. App. 1-11. Other courts have universally acknowledged this valid spousal signature prohibition. *RL BB Acquisition*, 754 F.3d at 383; *Silverman*, 51 F.3d at 33; *Kline*, 782 N.W.2d at 458-62; *Boone*, 47 S.W.3d at 373-75.

The Wives' Complaint claims CBR required the Wives co-sign and/or guaranty their husbands' business debts violating ECOA prohibitions. The Wives' claims fall squarely within the ECOA protections. No one has ever disputed this.

Yet, the Eighth Circuit brazenly held that this obvious claimed ECOA violation is of no consequence. The Wives are powerless to sue or defend without standing. The lender's discrimination goes unchecked. How this does not stand for "circumvention or evasion" of the ECOA, one can only wonder.

Finally, Congress obviously intended that primarily, absolutely, and unconditionally liable guarantors fall within the ECOA's definition of "applicant with respect to any aspect of a credit transaction." The "zone of interests" protected by the ECOA obviously encompass this.

If, however, Congress didn't answer precisely that an "applicant with respect to any aspect of a credit transaction" includes primarily, absolutely, and unconditionally liable guarantors, then the FRB filled the gap through its clarifying amendment. Official Staff Interpretations, 12 C.F.R., Part 202, Supp. I (Aug. 15, 2011) (analyzing subsection 7(d)(5) and stating "a guarantee on an extension of credit is part of a credit transaction and therefore subject to the regulation").

The Eighth Circuit erroneously concluded that "applicant" doesn't include primarily, absolutely, and unconditionally liable guarantors when a loan transaction is extended, renewed, or is continued. The FRB obviously disagrees. Rather than give *Chevron* deference to the FRB's congressionally-delegated interpretation of "applicant" for "any aspect of a credit transaction," the Eighth Circuit, utilizing the fiction that the Wives' liability was "secondary" to that of PHC, imposed its "own construction on the [ECOA]." *Young*, 476 U.S. at 980 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). This Court should instead defer to the FRB's reasonable interpretation.

## ARGUMENT

### I. Parties possess statutory standing where their claims fall within a statute's "zone of interests" protected, and the damages claimed are proximately caused by the statutory violations. The ECOA's zone of interests protects the Wives against marital status discrimination in requiring the Wives co-sign and/or guaranty their husbands' business debts, and CBR's ECOA violations proximately caused the Wives' damages. The Wives possess ECOA statutory standing to sue.

Statutory standing requires claims falling within the statute's "zone of interests" and damages proximately caused by the statute's violations. *See Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388-90 (2014). Here, the Wives fall within the ECOA's zone of interests protected and were directly damaged by CBR's ECOA violation. The Wives possess ECOA standing.

#### A. The ECOA prohibits requiring spouses to co-sign or guaranty debts. The Wives' Complaint claims CBR required the Wives co-sign and/or guaranty their husbands' business debt. The Wives' claims fall squarely within the ECOA protections.

Since its 1975 enactment, Regulation B has prohibited creditors from requiring spousal signatures to

co-sign or guaranty debts. *See* 12 C.F.R. § 202.7 (1975). The current Regulation B continues this prohibition. 12 C.F.R. § 202.7(d)(1). While a creditor may request additional signatories for the debt, it can't require a spouse. 12 C.F.R. § 202.7(d)(5).

Using broad statutory authority under the ECOA (*see* 15 U.S.C. § 1691b(a)), the FRB's Regulation B states, in part, that "[a] creditor shall not require the signature of an applicant's spouse or other person on a credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1). Regulation B further states that if an additional party is necessary to support the credit requested, "[t]he applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party." 12 C.F.R. § 202.7(d)(5).

Congress expressly delegated authority to the FRB to "prescribe regulations" that "in the judgment of the [FRB] are necessary or proper to effectuate the purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a). It is well-settled that the agency's interpretation of the statute it is charged to administer is entitled to great deference:

> This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not

> find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency].

*Young*, 476 U.S. at 981 (alterations in original).

*Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Beeler v. Astrue*, 651 F.3d 954, 959 (8th Cir. 2011) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

In Regulation B's forty (40) years, Congress hasn't amended this spousal guaranty prohibition. In fact, Congress amended the ECOA in 2010, reaffirming that FRB regulations carry the force of law. 15 U.S.C. § 1691a(g) ("Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.").

This Court has concluded "congressional failure to revise or repeal the agency's [statutory] interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young*, 476 U.S. at 983 (quoting *N.L.R.B.*, 416 U.S. at 275).

Here, CBR hasn't challenged the FRB's § 202.7(d) prohibition against requiring spouses to co-sign or guaranty debts. The Eighth Circuit did not consider the FRB's authority under § 202.7(d) either. Pet. App. 1-11. Other courts have universally acknowledged this valid spousal signature prohibition. *RL BB Acquisition*, 754 F.3d at 383; *Silverman*, 51 F.3d at 33; *Kline*, 782 N.W.2d at 458-62; *Boone*, 47 S.W.3d at 373-75.

The Wives' Complaint claims CBR required the Wives co-sign and/or guaranty their husbands' business debts violating ECOA prohibitions. The Wives' claims fall squarely within the ECOA protections. No one has ever disputed this.

### B. Statutory standing requires falling within the "zone of interests" protected by the statute. The ECOA's broad purposes include eliminating marital status discrimination in credit transactions. The Wives' marital status discrimination claims fall within the ECOA's protected zone of interests.

Statutory standing requires "fall[ing] within the zone of interests protected by the law invoked." *Lexmark*, 134 S. Ct. at 1388 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *see also Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 97 (1998). Traditional statutory construction tools must show a "legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark* 134 S. Ct. at 1387.

Congress presumably legislates against this "zone-of-interests" test, which applies unless expressly negated. *See Bennett v. Spear*, 520 U.S. 154, 163 (1997). Courts may not limit statutory claims merely because "prudence" dictates. *Lexmark*, 134 S. Ct. at 1388. Rather, "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id.* at 1386 (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)) (internal quotation marks omitted).

### 1. Expressed legislative purposes clarify the statute's zone of protected interests. The ECOA's expressed purpose requires making credit available without marital status discrimination, including requiring spouses to co-sign and/or guaranty loans.

A statute's zone of protected interests is largely defined by the statute's purpose statement. In *Lexmark*, for example, the Court identified the statutory interests protected by examining the Lanham Act's "unusual, and extraordinarily helpful" purpose statement. 134 S. Ct. at 1389 (quoting *H.B. Halicki Prods. v. United Artists Commc'ns, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987)). The Lanham Act's purpose statement identified "protect[ing] persons engaged in [commerce within the control of Congress] against unfair competition." *Id.* (quoting 15 U.S.C. § 1127). Plaintiffs alleging injury to a commercial interest in reputation or sales thus "come within the

zone of interests in a suit for false advertising under § 1125(a)." *Id.* at 1390.

Here, Congress's ECOA purpose to eradicate credit discrimination is broad and remedial:

> **Findings and purpose**: The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility ***to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status***. Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status, as well as by the informed use of credit which Congress has heretofore sought to promote. It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all credit-worthy customers without regard to sex or marital status.

Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1500 (1974) (emphasis added).[3] Obviously, Congress intended to eliminate credit discrimination based on sex or marital status. *See* S. Rep. No.

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[3] Pub. L. No. 93-495, § 502 appears as a statutory note to 15 U.S.C. § 1691.

94-589, at 3 (1976) (sex and marital status "are, and must be, irrelevant to a credit judgment").

That is, requiring spouses to be primarily, absolutely, and unconditionally liable for debts falls within the ECOA's broad, remedial purposes. Congress intended to restrict creditors from requiring spousal liability for debts based solely on marital status.

Excluding primarily, absolutely, and unconditionally liable spouses from ECOA protections contradicts the ECOA's purpose to eliminate marital status credit discrimination. There is "no reason to artificially limit the possible meanings of 'applicant'" considering the ECOA broadly prohibits discrimination "with respect to *any aspect* of a credit transaction" and has "broad remedial goals." *RL BB Acquisition*, 754 F.3d at 385 (emphasis in original); *see also Silverman*, 51 F.3d at 33 ("[T]o affirmatively benefit by disregarding the requirements of the ECOA would seriously undermine the Congressional intent to eradicate gender and marital status based credit discrimination." (quoting *Integra Bank v. Freeman*, 839 F. Supp. 326, 329 (E.D. Pa. 1993))); *Shaumyan v. Sidetex Co.*, 900 F.2d 16, 18 (1st Cir. 1990) (ECOA is "remedial in nature"); *Empire Bank v. Dumond*, No. 13-CV-0388, 2013 WL 6238605, at *6 (N.D. Okla. Dec. 3, 2013) (defining guarantors as "applicants" "best effectuate[s] the ECOA's goal of preventing discrimination based upon marital status").

"Since discrimination is inherently insidious, almost presumptively intentional, yet often difficult

to detect and ferret out," Congress expressed that "strong enforcement of [the ECOA] is essential to accomplish its purposes." S. Rep. No. 94-589, at 415 (1976). This Court has previously construed similar statutory provisions broadly to encourage effective enforcement. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1334 (2011). While Congress empowered various federal agencies to enforce ECOA protections, Congress intended that the "chief enforcement tool will continue to be private actions for actual and punitive damages." S. Rep. No. 94-589, at 415 (1976); *see also United States v. Beneficial Corp.*, 492 F. Supp. 682, 685 (D.N.J. 1980), *aff'd*, 673 F.3d 1302 (3d Cir. 1981).

The Wives' Complaint claims that CBR required the Wives' primary, absolute, and unconditional liability to repay the Loans because they are married to PHC's owners. CBR's requirement hinged solely on marital status. The ECOA prohibits this precise credit discrimination.

Construing the ECOA's remedial purposes leads to the inescapable conclusion: the Wives' ECOA claims fall within the statute's zone of protected interests.

**2. Traditional statutory construction rules show that ECOA "applicants" include "debtors" contractually liable to pay the applied-for credit. CBR claims the Wives are "debtors" with contractual obligations to pay the applied-for debts. The Wives are "debtor-applicants" possessing ECOA standing.**

Courts must "give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question." *See Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 298 (2010) (quoting *United States v. Bernstein*, 423 U.S. 303, 310 (1976)); *see also Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory interpretation, [the Court's] task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve.").

The statutory construction should be consistent with, and not undermine the statute's basic objective. *See Kasten*, 131 S. Ct. at 1333; *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). A broad, remedial statutory purpose cautions against "narrow, grudging" statutory interpretations. *See Kasten*, 131 S. Ct. at 1334 (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

**a. A governing text's words are of paramount concern, and what they convey in their context is what they mean. The ECOA's text shows that primarily, absolutely, and unconditionally liable guarantors contractually obligated to repay the applied-for debt are "applicants" who apply for "credit." The Wives are therefore "debtor-applicants" possessing ECOA standing.**

Statutory construction begins with the statute's text, realizing that "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)). The Court must "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson,* 519 U.S. at 340. The inquiry ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

Here, the ECOA defines "applicant" to include "any person" who directly applies for "credit." *See* 15 U.S.C. § 1691a(b). The ECOA then defines "credit" as "the right granted by a creditor *to a debtor* to defer payment of debt or incur debts and defer its

payment." *See* 15 U.S.C. § 1691a(c) (emphasis added). That is, a "debtor" who contractually agrees with a creditor to repay the applied-for debts is an ECOA credit "applicant."

The ECOA doesn't define "debtor." In lieu of express statutory definition, Black's Law Dictionary defines a "debtor" as "[s]omeone who owes an obligation to another, esp. an obligation to pay money." BLACK'S LAW DICTIONARY (10th ed. 2014).

Under CBR's loan papers, Missouri law governs. *See, e.g.*, Doc. 40-1 at 24 (Exhibit D to *Community Bank of Raymore's First Amended Counterclaim* at 2). Missouri law considers guarantors who "owe[ ] payment or other performance of [an] obligation" a "debtor." *Clune Equip. Leasing Corp. v. Spangler*, 615 S.W.2d 106, 108 (Mo. Ct. App. 1981) (quoting Mo. Rev. Stat. § 400.9-105(1)(d)) ("[T]he definition of debtor appears broad enough to include guarantors. "); *see also Cherry Manor, Inc. v. Am. Health Care, Inc.*, 797 S.W.2d 817, 821 (Mo. Ct. App. 1990). The "overwhelming majority of courts" hold that a "guarantor is a debtor" within the meaning of Article 9 of the Uniform Commercial Code. *United States v. Kelley*, 890 F.2d 220, 223 (10th Cir. 1989) (quoting *In re Kirkland*, 91 B.R. 551, 553 (Bankr. 9th Cir. 1988) and citing additional authority from Alabama, California, Hawaii, Iowa, Massachusetts, Minnesota, Missouri, New York, North Dakota, Pennsylvania, and Vermont).

Here, the ECOA's plain and ordinary use of the word "debtor" to define persons who are "applicants"

shows the Wives, as "debtors," fall within the broad scope of persons who are "applicants." CBR claims the Wives are primarily, absolutely, and unconditionally liable to repay the applied-for Loans. The Wives meet the plain definition of "debtor." "Debtors" are "applicants" when they contractually agree to repay the lender the applied-for credit.

When each Loan matured, CBR claims the Wives' industry-standard "all encompassing" Guaranties made them primarily, absolutely, and unconditionally liable to repay the Loans. Doc. 70 at 18, 43. Simply put, when each Loan matured, CBR claims the Wives independently agreed to repay the Loans unless CBR extended, renewed, or continued the Loans. Doc. 70 at 27-28, 43. For instance, on May 1, 2010, when the first loan matured, CBR claims the Wives were required to repay the $249,900 even if CBR elected not to pursue PHC, the collateral, Gary Hawkins, Chris Patterson, or anyone else obligated to pay. *Id.* CBR claims the Wives were primarily, absolutely, and unconditionally liable as if they had co-signed PHC's notes themselves.

Accordingly, the Wives needed CBR to defer payment of the first Loan debt by extending, renewing, or continuing the credit or face suit to collect the full amount. *Id.* All four Loans were structured identically. When each Loan matured, the Wives needed CBR's extension, renewal, or continuation of the credit to avoid CBR's claims of immediate primary, absolute, and unconditional liability for the maturing Loan. *Id.*

The Wives are "debtor-applicants" who applied directly to CBR for credit under 15 U.S.C. § 1691a(b).

**b. Statutory text must be construed as a whole considering the statute's purpose and context. Construing the ECOA's text as a whole shows persons primarily, absolutely, and unconditionally liable to repay the applied-for debts are "applicants."**

Statutory language can't be considered in a vacuum, but must be considered in context in view of the overall statutory scheme. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The meaning of an unclear word or phrase may be determined by immediately surrounding words. *See James v. United States*, 550 U.S. 192, 222 (2007) ("[W]hich of various possible meanings a word should be given must be determined in a manner that makes it 'fit' with the words with which it is closely associated.").

A statutory interpretation requires considering the entire text, and considering the purpose and context of the statute. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1999 (2011); *Kasten*, 131 S. Ct. at 1330-31. Statutory construction "must, to the extent possible, ensure that the statutory scheme is coherent and consistent." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008).

**i. "Applicant" must be viewed in context which shows it includes those persons contractually liable to pay including small business owners who co-sign debts. Small business corporation "applicants" have no race, gender, or marital status providing no discriminatory basis upon which they can be denied credit. "Applicant" means persons in addition to the named borrowing entity agreeing to repay the applied-for debt.**

Here, "applicant" must be viewed in context. The statute protects applicants against "creditor" discrimination "with respect to any aspect of a credit transaction." 15 U.S.C. § 1691(a). This "any aspect of a credit transaction" phrase broadens the persons who are "applicants."

For instance, a corporate entity has no race, gender, marital status, age, or religion. Under the concurring *Hawkins* opinion, lenders can deny credit to women-owned or minority-owned small corporations based on gender or race, but the woman or minority owner directly impacted possesses no ECOA standing. Only the borrower-corporation, as "applicant" possesses ECOA standing.

This "narrow, grudging" ECOA reading enables lenders to discriminate against owners based on race,

gender, marital status, age, or religion without ECOA violation. Following the *Hawkins* concurrence leaves small corporation owners subject to the obvious discriminatory pretext that the corporation has no race or gender, and thus can't be discriminated against.

The ECOA expressly recognizes that a "person" under the definition of "applicant" includes "a corporation trust, estate, partnership, cooperative, or association." 15 U.S.C. § 1691a(f). Who constitutes such a "cooperative" or an "association"?

If condominium owners who are primarily minorities form a non-profit corporation to manage the "association" which is denied credit, is the race-less, non-profit corporation the "putative debtor" and only party with standing? When the race-less, non-profit association brings a claim for ECOA race discrimination, won't they face the specious arguments under the "putative debtor" pretext that a corporation has no race, and therefore can't assert a claim? Aren't the actual condominium owners who comprise the non-profit corporation the real parties who have suffered discrimination?

In the same way, persons primarily, absolutely, and unconditionally liable to repay the applied-for debts comprise persons who are part of "any aspect of a credit transaction."

The ECOA doesn't say that "any person" includes only the person "who requests credit to benefit herself." The ECOA doesn't say "any person" includes

only the "borrowing entity." The ECOA doesn't say a guarantor, mortgagor, pledger, surety, or accommodation party isn't a "person" who "applies directly" for an extension or renewal of credit.

What CBR wants the ECOA to say, it just simply doesn't say.

### ii. ECOA data collection requirements show that "applicants" include persons identified with or connected to the credit transaction. Persons owning small businesses and persons agreeing to repay the applied-for debts are identified with and connected to the credit transaction.

CBR's trumpeted and impermissibly "grudging, narrow" ECOA interpretation adopted by *Hawkins* can't withstand even minimal reflection under the ECOA's data collection requirements. *See* 15 U.S.C. § 1691c-2. The ECOA requires lenders to gather "small business loan" information relating to "women-owned" and "minority-owned" businesses. § 1691c-2(a)-(b). This required data collection is triggered "in the case of any application to a financial institution for credit for women-owned, [and] minority-owned" businesses. § 1691c-2(b).

The ECOA expressly prohibits bank "underwriters or other officer[s] or employee[s]" who determine

approvals "concerning an application for credit" any access to information on the women owners or minority owners. § 1691c-2(d)(1). In fact, if those bank decision makers on "applications for credit" learn of such information, the bank must provide notice to the "applicant" that such decision makers learned of the women-owned, minority-owned information and that the bank "may not discriminate on the basis of such information." § 1691c-2(d)(2).

As if this doesn't seem to slam the door on CBR's "grudging, narrow" ECOA interpretation, further provisions sound the door closing even more loudly. The required information gathering includes "the principal place of business of the women-owned [or] minority-owned" business and "the race, sex, and ethnicity of the principal owners of the business." § 1691c-2(e)(2)(E), (G). Minority-owned and women-owned businesses are defined as those with "more than 50 percent of the ownership or control of which is held by 1 or more" minority individuals or women. § 1691c-2(h)(5)-(6).

Surely looking behind the veil of a small business corporation at who the owners are to establish ECOA discrimination was fully envisioned by Congress. Otherwise, a "grudging, narrow" ECOA reading would provide lenders unbridled license to discriminate against small corporations claiming they have no race, gender, marital status, etc.

### c. Statutory interpretations that validate outweigh interpretations that invalidate because legislatures don't enact meaningless laws.

A presumption exists that legislatures don't enact useless or meaningless legislation. *Corley v. United States*, 556 U.S. 303, 314 (2009) ("The Government's reading is thus at odds with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation marks omitted))).

If the entity-borrower is the sole ECOA "applicant" as suggested in the *Hawkins* concurrence and trumpeted by CBR, then the ECOA's protections are meaningless. The entity-borrower has no race, gender, age, or ethnicity and can't be discriminated against. Limiting the ECOA's protections to only the entity-borrower renders the ECOA toothless to enforce discrimination claims for small businesses.

**d. The Wives "applied" under the ECOA to CBR for extensions, renewals, and continuations of credit as co-signors and/or guarantors primarily, absolutely, and unconditionally liable to repay the applied-for Loans. The Wives were "applicants" for renewal falling within the ECOA's "zone of interests."**

Primary, absolute, and unconditional guarantors are liable under Missouri law as if they co-signed the note because the guaranty contract defines the guarantor's obligation. *See Jamieson-Chippewa Inv. Co. v. McClintock*, 996 S.W.2d 84, 87-88 (Mo. Ct. App. 1999). If a guarantor assumes primary liability, the creditor need not pursue other avenues of repayment. *Mercantile Bank, N.A. v. Loy*, 77 S.W.3d 93, 98 (Mo. Ct. App. 2002). A party that "guarantees payment" rather than collection and assumes primary and unconditional liability is no different than a party co-signing the note.

Here, CBR required the Wives to sign industry-standard guaranty contracts. Under these industry-standard contracts, the Wives are liable regardless of whether CBR pursues remedies against PHC, property securing the Loans, or anyone else. CBR claims the Wives were primarily, absolutely, and unconditionally liable as if they had co-signed PHC's notes themselves. Doc. 70 at 27-28, 43.

The Eighth Circuit ignored this reality when characterizing the Wives' obligations as "collateral" and "secondary." Pet. App. 6. The Wives *were* exposed to the same legal consequences as PHC and the husbands. The Wives were thus "applicants with respect to any aspect of a credit transaction" and "appli[ed] to [CBR] directly" for renewal of the Loans. 15 U.S.C. § 1691a(b).

Contrary to the Eighth Circuit, CBR doesn't consider the Wives' obligations "collateral" or "secondary." CBR claims it can enforce the Wives' Guaranties without exhausting remedies against PHC or others. *E.g.*, Doc. 70 at 24; *accord Loy*, 77 S.W.3d at 38. CBR requested the Wives be held liable for "100% of the 'Indebtedness'" before obtaining a judgment against PHC, Gary Hawkins, or Chris Patterson. Doc. 70 at 34.

The Wives were primarily, absolutely, and unconditionally liable each time CBR renewed the Loans, and were parties to each renewal. The Wives participated in the "renewal, or continuation of credit." The Wives were credit "applicants" within the "zone of interests" protected by the ECOA.

### C. The Eighth Circuit's *Hawkins* decision ignores the plain, ordinary meaning of the ECOA to reach an untenable conclusion.

Contrary to the FRB, the Eighth Circuit decided that the ECOA's definition of applicant unambiguously

excludes spousal guarantors. Pet. App. 4-11. Though a guarantor "desires for a lender to extend credit to a borrower," the Eighth Circuit concluded that a guarantor doesn't request credit or otherwise apply for credit by signing a guaranty. Pet. App. 6-11. The Eighth Circuit found that "***assuming a secondary, contingent liability*** does not amount to a request for credit" because a guarantor "engages in different conduct, receives different benefits, and ***exposes herself to different legal consequences than does a credit applicant.***"[4] Pet. App. 8 (emphasis added).

### 1. The Eighth Circuit reached the untenable conclusion that illegal contracts violating the ECOA can't be challenged by the Wives because they aren't "applicants."

The Eighth Circuit recognized that the Wives challenged the primary, absolute, and unconditional Guaranties as unenforceable violating the ECOA. Pet. App. 2-3. Nevertheless, the Eighth Circuit in a dizzying effort to justify dismissing the Wives' claims, stated that "[i]f [the Wives] do not qualify as applicants, then [CBR] did not violate the ECOA by requiring them

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[4] In stating that guarantors incur only "secondary" and "contingent" liabilities, the Eighth Circuit ignored CBR's claims and the record on appeal. CBR claims the Wives' guaranties are primary, absolute, and unconditional liabilities, and that CBR may collect from the Wives without first pursuing the borrowers or any collateral.

to execute the guaranties." Pet. App. 5. Stated differently, even though the ECOA and Regulation B prohibit requiring spouses to co-sign or guaranty debts, lenders aren't liable because the persons illegally required to sign can't sue.

Following this thought process to its logical end is like searching for the end to a long piece of yarn heaped in a pile on your Grandma's table – maybe if you dig long enough it can be found, but there are no assurances it can be untangled or used in any meaningful way. The Eighth Circuit leaves few clues as to where we can find such an end, and trumpets only a grossly oversimplified conclusion: "we conclude that a guarantor is not protected from marital status discrimination by the ECOA." Pet. App. 9.

But the Eighth Circuit's oversimplified conclusions exact a disservice on the black letter principle that illegal contracts are unenforceable. *Kaiser*, 455 U.S. at 78; *Silverman*, 51 F.3d at 33; *Meadors*, 753 F.2d at 593; *Kline*, 782 N.W.2d at 461; *Eure*, 448 S.E.2d at 419; *Boone*, 47 S.W.3d at 375; *King*, 495 S.W.2d at 77. Following the Eighth Circuit's tangled conclusions leads only to the logical end that persons signing illegal guaranties prohibited by the ECOA and Regulation B are defenseless against the illegal contract's enforcement.

For instance, under the Eighth Circuit's conclusions, persons being sued in federal court to enforce illegal guaranties violating the ECOA can't defend the illegal guaranties' enforcement. That is, according

to the Eighth Circuit, "a guarantor is not protected from marital-status discrimination by the ECOA" even though the contract violates the signature prohibitions.

Simply put, the federal courts will be required to lend themselves to the enforcement of illegal contracts directly contradicting this Court's holding in *Kaiser*. *See Kaiser*, 455 U.S. at 78 ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract."); *see also Silverman*, 51 F.3d at 33.

**2. The Eighth Circuit's interpretation of "applicant" impermissibly narrows the ECOA's protection to only the borrowing entity that approaches the lender, and leaves individual minority business owners unprotected against discrimination because they don't meet the Eighth Circuit's technical definition of "applicant." The Sixth Circuit's interpretation correctly concludes additional persons/entities offering promises supporting an application can be "applicants."**

The Eighth Circuit reasoned that the ECOA protects individuals who have "participated in the loan-application process." Pet. App. 11. The Eighth Circuit didn't elaborate on the extent to which individuals

must "participate" in the loan-application process to qualify as applicants, except to state that guarantors do not "participate" by virtue of signing their guaranties. Pet. App. 4-11. The Eighth Circuit determined that the Wives, based purely on their status as guarantors, couldn't be considered applicants. *Id.* The Eighth Circuit's lack of analysis is telling because it limits protection only to the borrowing entity who applied for the loan.

For example, under the Eighth Circuit's impermissibly narrow reading of "applicant," if the Wives formally had co-signed promissory notes with PHC, the Wives are "applicants." However, simply because the Wives signed as primarily, absolutely and unconditionally liable guarantors (in substance co-signing the Loans under Missouri law), the Wives aren't entitled to ECOA protection. The Eighth Circuit's narrow reading is circuitous and elevates form over substance.

The ECOA prohibits discrimination against "any applicant, with respect to any aspect of a credit transaction." 15 U.S.C. § 1691(a). The Eighth Circuit made an end-run around the "any aspect of a credit transaction" language. The Eighth Circuit ignored this expansive language and ruled, without definition or explanation, that ECOA protection is only afforded to participants in the "loan application process." Pet. App. 11.

What does this vague notion really mean? Is only the borrowing entity participating in "any aspect of a

credit transaction"? Is a lender-required spousal guarantor not participating? Did PHC's owners, Chris Patterson and Gary Hawkins, also guarantors, participate in the "loan application process"? If so, how was their participation different than the Wives'? These questions indict the Eighth Circuit's ruling.

Under the Eighth Circuit's narrow reading, if two minority women form a limited liability company to operate their business, and they are denied credit, they have no standing because the limited liability company is technically the "borrower" and the only "applicant." The Eighth Circuit followed neither its own precedent nor precedent from this Court. Rather than give *Chevron* deference to the FRB's congressionally delegated interpretation of "applicant" for "any aspect of a credit transaction," the Eighth Circuit, utilizing the fiction that the Wives' liability was "secondary" to that of PHC, imposed its "own construction on the [ECOA]." *Young*, 476 U.S. at 980 (quoting *Chevron*, 467 U.S. at 842-43).

The *Hawkins* concurrence squeezes the ECOA's scope even further by suffocating rights obviously protected. The *Hawkins* concurrence concludes that the ECOA unambiguously defines "applicant" as "the single person to whom credit would be extended, not a third party asking on behalf of the putative debtor." Pet. App. 12. According to the concurring *Hawkins* opinion, the ECOA "specifically envisions the involvement of a third party who requests an extension of credit to a first-party applicant, but distinguishes between the third party requestor and the 'applicant.'"

Pet. App. 13. The *Hawkins* concurrence concludes that the "'applicant' is the party to whom credit will be extended"; therefore, only the corporate borrower qualifies as an ECOA credit applicant. Pet. App. 14.

The ECOA expressly recognizes that a "person" under the definition of "applicant" includes "a corporation trust, estate, partnership, cooperative, or association." 15 U.S.C. § 1691a(f). Who constitutes a "cooperative" or "association"?

If condominium owners who are primarily minorities form a non-profit corporation to manage the "association" which is denied credit, is the race-less, non-profit corporation the "putative debtor" and only party with standing? When the race-less, non-profit association brings a claim for ECOA race discrimination, will they not face the specious arguments under the "putative debtor" pretext that a corporation has no race, and therefore can't assert a claim? Are the actual condominium owners who comprise the non-profit corporation the real parties who have suffered discrimination? If only the entity-borrower can be an "applicant," who possesses the race, gender, marital status, age, or religion of the entity-borrower?

### 3. The ECOA and Regulation B protect individuals such as Valerie Hawkins and Janice Patterson from financial ruin resulting from their spouses' failed business ventures. The Eighth Circuit's interpretation of "applicant" removes spousal guarantors from the ECOA's protection, permits destruction of disinterested spouses' creditworthiness, and promotes credit discrimination against married women.

Small business owners like Gary Hawkins are often mandated to obtain spousal guaranties as a condition for a commercial loan. By requiring the spouse to guaranty credit to a borrowing entity in which that spouse has no interest or position, the lender requires the spousal guarantor to incur (often extensive) liability solely based on marital status.

The disinterested spousal guarantor doesn't control significant liabilities resulting from business failures. These liabilities impair the spouse's creditworthiness, often making it impossible to independently qualify for future credit.

For example, Valerie Hawkins, according to CBR's allegations, was primarily, absolutely, and unconditionally liable for over $2 million. If lenders are permitted to require uninterested spousal guaranties, credit will be unavailable to otherwise creditworthy, married applicants such as Valerie Hawkins. *See Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982).

Curiously, the Eighth Circuit concluded that the ECOA's policies "focus on ensuring fair access to credit by preventing lenders from excluding borrowers from the credit market based on the borrowers' marital status." Pet. App. 9. The Eighth Circuit claims that the ECOA's purpose does not extend to spousal guarantors who claim to have been improperly *included* in the lending process, rather than *excluded* due to marital status. Pet. App. 9-10. The Eighth Circuit's analysis ignores damage to the disinterested spouse's independent creditworthiness caused by spousal guaranties required by lenders.

Here, CBR required Valerie Hawkins to execute personal guaranties which CBR claims require her to individually repay the Loans. Ms. Hawkins holds no ownership interest, position, or other interest in PHC. CBR required that she execute personal guaranties as a condition for PHC, her husband's small business, to receive credit from CBR.

Married applicants saddled with their spouse's debt are unbankable and unable to independently qualify for credit. Regulation B's inclusion of spousal guarantors as "applicants" "best effectuate[s] the ECOA's goal of preventing discrimination based upon marital status." *Empire Bank*, 2013 WL 6238605, at *6. The Eighth Circuit's decision eliminates "entire aspects of the Federal Reserve Board's implementation scheme," including protection for spousal guarantors. *See Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08CV654, 2010 WL 3931496, at *9 (N.D. Okla. Oct. 5, 2010).

Here, the Eighth Circuit's substitution of its judgment for the FRB's ignores the Wives' position at each loan renewal. The computer-generated form guaranties routinely utilized by CBR and other lenders impose primary, absolute, and unconditional liability. At each renewal, Valerie Hawkins, who CBR claims is primarily, absolutely, and unconditionally liable for over $2 million, certainly wanted "an extension, renewal or continuation of credit" as provided under the ECOA. 15 U.S.C. § 1691a(b).

Under the Eighth Circuit's narrow reasoning, a "primarily and unconditionally liable" spousal guarantor who wants to renew, extend or continue the credit isn't an "applicant" because Congress unambiguously intended to exclude them from the ECOA's protections because they didn't participate in the initial "loan-application process." The Eighth Circuit's conclusion ignores that an "applicant" for "any aspect of a credit transaction" includes loan renewals.

**4. Congress does not enact meaningless legislation prohibiting discrimination against persons which can never be enforced. An ECOA "applicant" includes corporate entities which have no race, gender, or marital status, making it impossible to discriminate against these corporate entities without considering those persons identified with and connected to the corporation. The Eighth Circuit's flawed ECOA interpretation concludes that lenders may lawfully deny credit based on the race, gender, marital status, age or religion of individuals owning small corporations without violating the ECOA, opening the floodgates to lender discrimination against closely-held business owners without consequence.**

The *Hawkins* concurring opinion trumpeted by CBR leaves the ECOA's discriminatory prohibitions against small corporations meaningless. For instance, the *Hawkins* concurrence reasoned that a corporate-borrower qualifies as an ECOA credit "applicant," but not the individuals standing behind the entity. Pet. App. 13.

This enables lenders to discriminate against owners based on race, gender, marital status, age, or religion without ECOA violation. After *Hawkins*, small corporation owners now are subject to the

obvious discriminatory pretext that the corporation has no race or gender, and thus cannot be discriminated against.

The *Hawkins* concurrence also runs counter to the ECOA reporting requirements. The reporting requirements mandate that lenders "compile and maintain" information on "women-owned" and "minority-owned" credit applications, including the "race, sex, and ethnicity of the principal owners of the business." 15 U.S.C. § 1691c-2(b), (e)(2)(G). CBR, however, argues that 15 U.S.C. § 1691c-2(3)'s prohibition on including the "name, specific address and telephone number concerning any individual who is, or is connected with, the women-owned, minority-owned" business loan somehow illustrates that the ECOA unambiguously excludes guarantors from protection. *See* Brief in Opp. to Pet. at 34.

CBR's argument and the *Hawkins* concurrence overlook the obvious: the ECOA expressly requires race and gender information germane to discriminatory conduct by identifying the individual race and gender for persons standing behind the entity-borrower. Contrary to CBR's suggestion, the ECOA's reporting requirements illustrate Congress's recognition that the ECOA's discriminatory prohibition can't be measured without considering the race, gender, and ethnicity of the individuals "connected with" the entity-borrower. Limiting the ECOA's protections to only the entity-borrower renders the ECOA meaningless.

### D. Where the "harm alleged has a sufficiently close connection to the conduct the statute prohibits," a plaintiff satisfies the proximate-cause requirement. The Wives' claimed credit reputation injury is sufficiently closely connected to CBR's marital status discrimination requiring the Wives to co-sign for their husbands' business debt. The Wives satisfy the proximate-cause requirement.

Statutory claims are "limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark*, 134 S. Ct. at 1390. Statutory standing isn't afforded to plaintiffs remotely damaged by the defendant's unlawful conduct. *Id.* This "proximate cause analysis" turns on whether "the harm alleged has a sufficiently close connection" to the prohibited conduct. *Id.*

Here, CBR's ECOA violations directly damaged the Wives. The Wives' Complaint claims CBR discriminated against the Wives based on their marital status by requiring the Wives to sign primary, absolute, and unconditional guaranties as a condition for extending and renewing the applied-for Loans.[5]

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[5] CBR does not challenge the validity of § 202.7(d)(1). Section 202.7(d)(1) prohibits a creditor from requiring "the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for

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Actual damages resulting from an ECOA violation may include injury to credit reputation, mental anguish, humiliation, or embarrassment. *Anderson*, 666 F.2d at 1277-78; *Sayers v. General Motors Acceptance Corp.*, 522 F. Supp. 835, 841 (W.D. Mo. 1981).

By requiring the spouse to co-sign for credit to a borrowing entity in which that spouse has no interest or position, the lender requires the spouse to incur (often extensive) liability solely based on marital status. The disinterested spousal guarantor doesn't control significant liabilities resulting from business failures. These liabilities impair the spouse's credit reputation, often making it impossible to independently qualify for future credit.

For example, CBR claims Valerie Hawkins is primarily, absolutely, and unconditionally liable for over $2 million. If lenders are permitted to require uninterested spousal guaranties, credit will be unavailable to otherwise creditworthy, married applicants such as Valerie Hawkins.

Here, CBR required Valerie Hawkins to execute personal guaranties which CBR claims require her to individually repay the Loans. Ms. Hawkins holds no ownership interest, position, or other interest in

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the amount and terms of the credit requested." *See also* 15 U.S.C. § 1691a(g) ("Any reference to any requirement under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question").

PHC. CBR required that she execute personal guaranties as a condition for PHC, her husband's small business, to receive credit from CBR. Married applicants saddled with their spouse's debt become unbankable and unable to independently qualify for credit.[6] The Wives' credit-reputation injury "has a sufficiently close connection" to the prohibited conduct. *Lexmark*, 134 S. Ct. at 1390.

### E. Contracts prohibited by law are void and unenforceable, and the ECOA provides equitable and declaratory relief necessary to enforce the ECOA's prohibitions. The Wives alleged that CBR required them to incur personal liability in violation of federal law. The Wives can seek ECOA equitable and declaratory relief for CBR's federal law violations.

Contracts prohibited by law are void, and can't be enforced in law or in equity. *Kaiser*, 455 U.S. at 77-78; *Boone*, 47 S.W.3d at 375-76; *King*, 495 S.W.2d at 77; *see also Silverman*, 51 F.3d at 33; *Kline*, 782 N.W.2d at 461-62; *Eure*, 448 S.E.2d at 419.

Courts don't carry out contracts rooted in illegal acts because such contracts are void from inception.

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[6] Regulation B's inclusion of spousal guarantors as "applicants" "best effectuate[s] the ECOA's goal of preventing discrimination based upon marital status." *Empire Bank*, 2013 WL 6238605, at *6.

*Kaiser*, 455 U.S. at 84. Here, the Wives' Complaint sought declaratory relief that the Guaranties are void. A contract procured in violation of Regulation B is null and void. *See Boone*, 47 S.W.3d at 373; *see also Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 291 (Mo. Ct. App. 2012); *Kline*, 782 N.W.2d at 462. The Wives satisfy the proximate-cause requirement.[7]

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[7] The Wives also alleged that CBR's violations caused other damages, including attorneys' fees, mental anguish, humiliation, and embarrassment.

## II. Parties to an illegal contract possess standing to invalidate the contract as illegal and unenforceable regardless of statutory standing. No one disputes that the Wives' Complaint claims CBR required illegal contracts violating 12 C.F.R. § 202.7(d) and the ECOA. The Wives possess standing to invalidate illegal contracts regardless of any standing under 15 U.S.C. § 1691e.

### A. Declaratory judgment actions allow parties to determine rights prior to suit for coercive remedies. Suits to declare contracts illegal are suits to declare the parties' contract rights prior to seeking coercive remedies for breach. Contract parties have standing to bring declaratory actions to establish the contract's illegality.

The Declaratory Judgment Act authorizes federal courts to determine the parties' rights upon request of a party to an actual controversy. *See* 28 U.S.C. § 2201(a) ("In a case of actual controversy within its jurisdiction, any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.").

Declaratory judgment actions provide avenues to determine rights without waiting to get sued. *See, e.g.*, *United Food & Commercial Workers Local Union Nos. 137, 324, 770, 899, 905, 1167, 1222, 1428, & 1442 v. Food Emp'rs Council, Inc.*, 827 F.2d 519, 524

(9th Cir. 1987); *see also* Wright, Miller, & Kane, *Purpose of Declaratory Judgments*, 10B Fed. Prac. & Proc. Civ. § 2751 (3d ed.) ("[The declaratory judgment remedy] gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy and in cases in which a party who could sue for coercive relief has not yet done so.").

The existence of an actual controversy under the Declaratory Judgment Act turns on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

Disputes over a contract's legality present a "case of actual controversy." *See United Food*, 827 F.2d at 522-23; *cf. Kaiser*, 455 U.S. 72 ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law."). That is, one party seeks to preserve the contract's enforceability, and the other seeks its invalidation. This presents a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See United Food*, 827 F.2d at 523 (quoting *Md.*

*Cas. Co.*, 312 U.S. at 273).[8] A contract's invalidation as illegal redresses the harms occasioned by enforcement. *See id.* at 524.

Here, the Wives' Complaint alleges CBR violated the ECOA by requiring illegal Guaranties. CBR claims the Guaranties are enforceable. The parties "persist[ ] in their conflicting legal positions." A suit declaring the Guaranties illegal is a case of actual controversy.

Thus, the Wives possess standing to seek declaratory relief invalidating the Guaranties as illegal. This standing exists regardless of 15 U.S.C. § 1691e(c)'s standing provided to "aggrieved applicants." That is, whether or not this Court determines the Wives are "aggrieved applicants" under § 1691e(c), as parties to contracts over which there exists a dispute as to illegality, the Wives have standing to ask a court[9] to declare such contracts illegal and unenforceable.

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[8] Missouri has a similar statute. *See* Mo. Rev. Stat. § 527.010; *see also Citizens Ins. Co. of Am. v. Leiendecker*, 962 S.W.2d 446, 449 (Mo. Ct. App. 1998) (contracting parties who dispute the enforceability of the contract present justiciable controversy under Missouri law); Mo. Rev. Stat. §§ 527.020, 527.030 (Missouri courts can construe parties' contract rights either before or after breach via declaratory judgment).

[9] The federal Declaratory Judgment Act does not confer subject matter jurisdiction but rather provides an express declaratory remedy in cases within the courts' jurisdiction. *See* 28 U.S.C. § 2201(a) ("In a case of actual controversy within its jurisdiction. . . ."). Thus, whether a contracting party could file its claim in federal court depends on the existence of federal subject matter jurisdiction apart from the Declaratory Judgment Act. *See United Food*, 827 F.2d at 523.

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The District Court, however, purportedly found that the Wives lacked standing to seek a declaration that the Guaranties are illegal and unenforceable. Pet. App. 17. To the extent that the Eighth Circuit's ruling affirmed, the Eighth Circuit erred. If this Court affirms the Eighth Circuit's ruling that the Wives lacked standing to bring affirmative claims under the ECOA, this Court must reverse the District Court's ruling that the Wives lack standing to challenge the Guaranties' legality.

### B. The ECOA, under 12 C.F.R. § 202.7(d), prohibits requiring spousal guaranties. CBR hasn't challenged § 202.7(d)'s validity, and the Wives' Complaint claims CBR required the Wives' guaranties under the proscribed circumstances. The Wives' Complaint claims CBR violated the ECOA, and the Wives' guaranties are illegal.

Since its enactment, Regulation B has prohibited creditors from requiring spousal signatures. *See* 12

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The Wives and CBR are not diverse, and a suit to collect on the Guaranties presents no federal question. *See id.* (whether subject matter jurisdiction exists in a federal declaratory action depends on the nature of the declaratory judgment defendant's potential coercive suit); *see also Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952). Thus, the Wives' defensive declaratory action couldn't be filed in federal court unless this Court determines that spousal guarantors can bring an affirmative ECOA claim, providing federal subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1367.

C.F.R. § 202.7 (1975). Regulation B states, in part, that "[a] creditor shall not require the signature of an applicant's spouse or other person on a credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1). Regulation B also provides that if an additional party is necessary to support the credit requested "[t]he applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party." 12 C.F.R. § 202.7(d)(5).

In Regulation B's forty (40) years, Congress hasn't narrowed the ECOA's spousal guaranty prohibition. CBR hasn't challenged § 202.7(d). The Eighth Circuit didn't consider the FRB's authority to prohibit spousal guaranties in § 202.7(d). There is no dispute the Wives' Complaint claims CBR violated the ECOA[10] by requiring the Spouses' guaranties: 12 C.F.R. § 202.7(d) prohibits precisely this practice, and CBR hasn't challenged the validity of § 202.7(d).

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[10] CBR's violation of Regulation B constitutes a violation of the ECOA. *See* 15 U.S.C. § 1691a(g) ("Any reference to any requirement under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question").

## III. When Congress delegates an agency authority to fill any explicit or implicit statutory "ambiguity" or "gap," courts grant deference to the agency's reasonable interpretation. Congress expressly delegated the FRB broad authority to prescribe regulations effectuating the ECOA's purposes. If Congress's definition of "applicant with respect to any aspect of a credit transaction" is ambiguous concerning primarily, absolutely, and unconditionally liable guarantors, the Court should defer to the FRB's reasonable interpretation.

### A. Congress intended that ECOA "applicants" include "debtors" contractually liable to pay the applied-for debt. The FRB's 1985 Regulation B clarifying amendment underscores Congress's intent that "debtor-applicants" possess ECOA standing. This Court should defer to the FRB's reasonable clarifying amendment.

Congress intended that primarily, absolutely, and unconditionally liable guarantors fall within the ECOA's definition of "applicant with respect to any aspect of a credit transaction." *See supra* at Part I. The "zone of interests" protected by the ECOA encompass primarily, absolutely, and unconditionally liable guarantors.

The FRB's 1985 Regulation B clarifying amendment fulfills Congress's intent that "debtor-applicants,"

including primarily, absolutely, and unconditionally liable guarantors, have ECOA standing. This Court should defer to the FRB's reasonable interpretation. *See Beeler*, 651 F.3d at 959 ("*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" (quoting *Mead*, 533 U.S. at 226-27)).

### B. Congress intended that an ECOA "applicant with respect to any aspect of a credit transaction" includes primary, absolute, and unconditional guarantors. But, if Congress didn't answer this precise question, then Congress expressly empowered the FRB to address any gap or ambiguity consistent with the ECOA's purpose. The FRB properly exercised its authority by including guarantors within the ECOA's definition of "applicant."

As noted above, Congress intended that primarily, absolutely, and unconditionally liable guarantors fall within the ECOA's definition of "applicant with respect to any aspect of a credit transaction." The "zone of interests" protected by the ECOA encompass primarily, absolutely, and unconditionally liable guarantors.

If, however, Congress didn't answer precisely that "applicant[s] with respect to any aspect of a

credit transaction" includes primarily, absolutely, and unconditionally liable guarantors, then the FRB filled the gap through its clarifying amendment. Official Staff Interpretations, 12 C.F.R., Part 202, Supp. I (Aug. 15, 2011) (analyzing § 202.7(d)(5) and stating "a guarantee on an extension of credit is part of a credit transaction and therefore subject to the regulation"); *see also Chevron*, 467 U.S. at 843-44 (when Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

"[A]ny ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 533 U.S. at 227; *see also E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1604 (2014) ("[A] full understanding of the force of the statutory policy depends upon more than ordinary knowledge of the situation, [therefore] the administering agency's construction is to be accorded controlling weight unless arbitrary, capricious, or manifestly contrary to the statute." (internal quotation marks omitted)).

Here, Congress expressly delegated the FRB[11] authority to "prescribe regulations" that "in the

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[11] The 2010 amendments to the ECOA vested the authority to promulgate regulations under the statute to the Consumer Financial Protection Bureau. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1085(1), 124 Stat. 1376, 2083 (2010).

judgment of the [FRB] are necessary or proper to effectuate the purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a). Using this broad statutory authority, the FRB implemented Regulation B in 1975.

Regulation B states, in part, that "[a] creditor shall not require the signature of an applicant's spouse or other person on a credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1). Regulation B further states that if an additional party is necessary, "[t]he applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party." 12 C.F.R. § 202.7(d)(5). CBR violated § 202.7(d)(1) and (5) by requiring the Wives to sign spousal guaranties.

Regulation B originally excluded guarantors from enforcing the ECOA. In 1985, however, the FRB amended Regulation B to include guarantors as "applicants" for the limited purpose of § 202.7(d), affording spousal guarantors unlawfully required to sign guaranties standing to seek legal remedies. *See* 12 C.F.R. § 202.2(e); Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018, 48,020 (Nov. 20, 1985). Regulation B, under 12 C.F.R. § 202.2(e), interprets the ECOA to afford the Wives statutory standing to bring claims for CBR's ECOA and § 202.7(d) violations.

The ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction." The Eighth Circuit erroneously concluded that "applicant" doesn't include primarily, absolutely, and unconditionally liable guarantors when a loan transaction is extended, renewed, or continued. The FRB obviously disagrees. Rather than give *Chevron* deference to the FRB's congressionally-delegated interpretation of "applicant" for "any aspect of a credit transaction," the Eighth Circuit, utilizing the fiction that the Wives' liability was "secondary" to that of PHC, imposed its "own construction on the [ECOA]." *Young*, 476 U.S. at 980 (quoting *Chevron*, 467 U.S. at 842-43). This Court should instead defer to the FRB's reasonable interpretation.

### C. When Congress charges an agency to implement and enforce a statute, then deference is granted to the agency's statutory interpretation. Congress expressly delegated to the FRB broad authority to prescribe regulations to effectuate the ECOA's purposes. The Eighth Circuit failed to follow binding authorities by substituting its own construction of "applicant" for the decades-long reasonable interpretation made by the FRB.

Congress expressly delegated authority to the FRB to "prescribe regulations" that "in the judgment of the [FRB] are necessary or proper to effectuate the

purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a). The FRB followed its congressional directive and interpreted the term "applicant" promulgating Regulation B to effectuate the purposes of the ECOA. It is well-settled that the agency's interpretation of the statute it is charged to administer is entitled to great deference:

> This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency].

*Young*, 476 U.S. at 981 (alterations in original).

"*Chevron* deference is appropriate when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Beeler*, 651 F.3d at 959 (quoting *Mead*, 553 U.S. at 226-27).

Finally, the ECOA "has undergone several amendments since the Federal Reserve included guarantors within the definition of 'applicant' – including an extensive amendment after *Moran*[12] was

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[12] *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007).

decided – and none has clarified that the term 'applicant' cannot include guarantors." *RL BB Acquisition*, 754 F.3d at 386. "[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young*, 476 U.S. at 983 (quoting *N.L.R.B.*, 416 U.S. at 275). Congress's decision to leave unchanged the FRB's ECOA interpretation and promulgation of Regulation B did not give the Eighth Circuit license to substitute its judgment for the FRB's. *Chevron*, 467 U.S. at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").[13]

### D. An agency's interpretation that fulfills the statute's purpose is "within the bounds" of the agency's authority and reasonable. The FRB's ECOA interpretation and 1985 Regulation B clarifications that spousal guarantors are applicants fulfill the ECOA's purpose to eradicate marital discrimination in credit transactions. FRB's clarifying amendment is reasonable and entitled to deference.

Under *Chevron*, the Court presumes that when an agency-administered statute is ambiguous regarding

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[13] Unlike the Eighth Circuit, the Sixth Circuit is unwilling to "strike down a valid regulation to salvage bad underwriting" and "invalidate a regulation over a disagreement with an agency's policy which Congress has had time and opportunity to reverse." *RL BB Acquisition*, 754 F.3d at 386.

what it prescribes, "Congress has empowered the agency to resolve the ambiguity. The question for a reviewing court is whether in doing so the agency has acted reasonably and thus has 'stayed within the bounds of its statutory authority.'" *Utility Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2439 (2014) (quoting *Arlington v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013)); *Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. " (footnote omitted)).

Congress expressly granted the FRB authority to "prescribe regulations" that "in the judgment of the [FRB] are necessary or proper to effectuate the purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a).

Congress articulated the ECOA's purpose:

> The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to

> all credit-worthy customers without regard to sex or marital status.

Pub. L. No. 93-495, § 502.

Regulation B's purpose mirrors the ECOA's purpose:

> The purpose of this regulation is to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age. The regulation prohibits creditor practices that discriminate on the basis of any of these factors.

12 C.F.R. § 202.1(b).

Consistent with the ECOA's broad purpose, the FRB proposed revisions to Regulation B in March 1985 against a backdrop of decisions[14] denying

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[14] *See, e.g., Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 595 F. Supp. 800 (E.D. Pa. 1984) (creditor required husband/general partner and his wife to sign guaranties for a loan to husband's business; court determined that because the husband signed continuing guaranty as a guarantor, he was not an "applicant"); *Morse v. Mut. Fed. Sav. & Loan Assoc. of Whitman*, 536 F. Supp. 1271, 1278 (D. Mass. 1982) (wife whose signature was required on husband's promissory note was not an aggrieved applicant because she signed the note as a guarantor); *Delta Diversified, Inc. v. Citizens & Southern Nat'l Bank*, 320 S.E.2d 767, 771 (Ga. Ct. App. 1984) (principal shareholders and officers of corporation and their wives who personally guaranteed corporation's debt were not "applicants" and could not raise credit discrimination defense based on marital status).

standing to both business owner guarantors and spousal guarantors. Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 10,890, 10,891 (Mar. 18, 1985). The FRB clarified that the ECOA intended guarantors and similar parties to have standing to seek legal remedies when a 202.7(d) violation occurs. *Id.* The FRB proposed defining guarantors as applicants "to resolve the question of standing." *Id.* The FRB requested comment "on whether specific exclusion of guarantors from coverage under other sections is appropriate." *Id.*

The FRB received 166 comments on its proposal from creditors, Federal Reserve Banks, federal and state agencies, trade associations, consumer groups, and others. Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018, 48,018 (Nov. 20, 1985). The FRB received "concerns of industry commentators who believed that the unlimited inclusion of guarantors and similar parties in the definition might subject creditors to a risk of liability for technical violations of various provisions of the regulation." *Id.* The FRB revised the final version of the definition in response, including guarantors and similar parties as "applicants" only "for purposes of § 202.7(d)." *Id.*

FRB's 1985 clarifying amendment didn't unreasonably expand the ECOA's scope. FRB revised its definition of applicant:

> on the premise that although its primary concern may have been to protect the individual seeking credit, the Congress had a broader purpose in enacting the ECOA: to bar discrimination on the basis of marital status in any aspect of a credit transaction. Clearly, a person required to assume a debt obligation merely by virtue of being married to the applicant has suffered discrimination based on marital status.

Delores S. Smith, *Revision of the Board's Equal Credit Regulation: An Overview*, 1985 FEDERAL RESERVE BULLETIN 913, 918-19 (Dec. 1985).

"Given the industry concerns about lawsuits unrelated to signature violations, however, the Board revised the definition of applicant to include guarantors and similar parties only for purposes of the signature rules." *Id.* at 919. "The rule change is also consistent with the congressional intent for enforcement through private lawsuits because it gives the guarantor the right to bring a lawsuit or file a counterclaim against a creditor." *Id.*

Previously, the 1977 Regulation B amendment defined "Applicant" to include "any person who requests or who has received an extension of credit from a creditor, and includes any person who may be contractually liable regarding an extension of credit, other than a guarantor, surety, endorser, or similar party." *See* 12 C.F.R. § 202.2(e) (1977). The 1985 Regulation B amendment left unchanged that "applicant" includes "any person who may be contractually

liable regarding an extension of credit, but clarified that "applicant" includes "guarantors, sureties, endorsers, and similar parties" "[f]or purposes of § 202.7(d)." 12 C.F.R. § 202.2(e) (2015).

A primarily, absolutely, and unconditionally liable guarantor is certainly a person "contractually liable regarding an extension of credit." FRB's 1985 clarifying amendment did nothing more than restate the obvious: primarily, absolutely, and unconditionally liable guarantors have ECOA standing.

Utilizing its statutorily delegated authority to prescribe regulations "to effectuate the purposes" of the ECOA and "to prevent circumvention or evasion thereof," FRB clarified that "guarantors and similar parties [have] standing to seek legal remedies when a violation occurs under [the signature requirements of] § 202.7(d)." Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018, 48,020 (Nov. 20, 1985).

The FRB didn't exceed the "bounds of its statutory authority." *Utility Air Regulatory Group*, 134 S. Ct. at 2439. The FRB fashioned the 1985 amendment to both foster Congress's purpose to bar discrimination on the basis of marital status in any aspect of a credit transaction and address banking industry concerns that "unlimited inclusion of guarantors might subject creditors to a risk of liability for technical violations of various provisions of the regulation." 50 Fed. Reg. at 48,020.

The FRB's interpretation is "within the bounds of reasonable interpretation" and permissible. *Arlington*, 133 S. Ct. at 1868; *see also Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 75 (1975) (agency's construction need not be "the only one it permissibly could have adopted"; concluding agency construction "was at the very least sufficiently reasonable it should have been accepted by the reviewing courts").

## CONCLUSION

Ignoring the well-settled principle that illegal contracts are unenforceable, the Eighth Circuit proclaimed that "[i]f [the Wives] do not qualify as applicants, then [CBR] did not violate the ECOA by requiring them to execute the guaranties." Pet. App. 5. Thus, according to the Eighth Circuit's jaundiced view, lenders can automatically require spouses to co-sign or guaranty debts – an act undisputedly prohibited by the ECOA and Regulation B – with impunity because the persons signing can't sue.

Congress intended that primarily, absolutely, and unconditionally liable guarantors fall within the ECOA's definition of "applicant with respect to any aspect of a credit transaction." The "zone of interests" protected by the ECOA obviously encompass this. Petitioners have statutory standing.

If, however, Congress didn't answer precisely that "applicant with respect to any aspect of a

credit transaction" includes primarily, absolutely, and unconditionally liable guarantors, then the FRB reasonably filled the gap through its clarifying amendment. Congress expressly delegated the FRB authority to "prescribe regulations" necessary in its judgment to effectuate the ECOA's purposes. Using this broad statutory authority, the FRB did just that by implementing Regulation B which has since inception prohibited creditors from automatically requiring spousal signatures to co-sign or guaranty debts.

The Eighth Circuit, however, erroneously concluded that "applicant" doesn't include primarily, absolutely, and unconditionally liable guarantors. The FRB obviously disagrees. Rather than give *Chevron* deference to the FRB's congressionally-delegated interpretation of "applicant" for "any aspect of a credit transaction," the Eighth Circuit, utilizing the fiction that the Wives' liability was "secondary" to that of PHC, impermissibly substituted its judgment for the FRB's and made its own ECOA construction. This Court should instead defer to the FRB's reasonable interpretation.

For the foregoing reasons, Petitioners request this Court reverse the Eighth Circuit Court of Appeals' holding that the ECOA's definition of "applicant" unambiguously excludes guarantors, and reverse the District Court's ruling in all respects including that Petitioners have no standing to seek

ECOA civil remedies such as challenging the Guaranties' legality. Petitioners also request remand of this proceeding to the District Court for resolution on the merits.

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